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Nos. 07-1428 and 08-328

In the Supreme Court of the United States

FRANK RICCI, ET AL., PETITIONERS

v.

JOHN DESTEFANO, ET AL., RESPONDENTS

FRANK RICCI, ET AL., PETITIONERS

v.

JOHN DESTEFANO, ET AL., RESPONDENTS

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF HISPANIC FIREFIGHTERS AND BRIDGEPORT HISPANIC FIREFIGHTERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The *amici curiae* are the International Association of Hispanic Firefighters (IAHF) and the Bridgeport Hispanic Firefighters Association (BHFA).[1] IAHF is a not for profit organization created to support Latino firefighters in the United States and the Latino family of nations, and to enhance service of and risk reduction in the Latino community. BHFA is also a not for profit organization created to provide networking and training opportunities for Latino firefighters in Bridgeport, Connecticut.

This case will affect the hiring and promotional practices of public safety offices in Connecticut and throughout the country, and through those practices the measures that local governments may use to guard against discrimination in employment and to promote diversity and services to traditionally underserved populations, including Latinos. As a result, the *amici* have a direct interest in this case.

SUMMARY OF ARGUMENT

This Court should affirm the Second Circuit's judgment that a decision to avoid potential discrimination is not itself discrimination. To reverse will exacerbate racial tensions in public safety departments in Connecticut and in other workplaces

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[1]The parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

throughout the country by giving credence to the notion that racial justice is a zero-sum game with every win for a person of color representing a loss for a white person, or vice versa.

Additionally, the key issue in a disparate treatment case is what motivated the employer to act. Motivation is a question of fact. In this case, there was compelling, unrefuted evidence to suggest that the defendants were motivated by a desire to comply with Title VII and avoid using discriminatory promotion criteria. Petitioners had the opportunity to show that these reasons were a pretext for discrimination, but they failed to create a genuine issue of material fact warranting denial of summary judgment because they did not provide any evidence from which a reasonable jury could conclude that the defendants are not being truthful about their motivation.

ARGUMENT

I. REVERSING THE SECOND CIRCUIT'S JUDGMENT THAT A DECISION TO AVOID POTENTIAL DISCRIMINATION IS NOT ITSELF DISCRIMINATION WILL EXACERBATE RACIAL TENSIONS IN PUBLIC SAFETY DEPARTMENTS IN CONNECTICUT AND IN OTHER WORKPLACES THROUGHOUT THE COUNTRY

This case has been framed in the media as if race in the workplace represents a zero-sum game, as if every promotion given to a person of color is an injury to a white person. This framing presumes uncritically a number of things: that white people are somehow naturally entitled to promotions, that people of color are not, and in this particular case, that

performance on standardized tests alone is an appropriate measure of merit. These uncritical presumptions and this sort of racial politics are wholly counterproductive to eliminating discrimination in this country.

The goal of Title VII is to eradicate discrimination, to change the social norms so that people no longer engage in acts that discriminate on the basis of race, in other words, to avoid the harm of discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). As a part of that effort, this Court has recognized that employers must be given incentives to voluntarily comply with the statute. *See*, *e.g. Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998). To say that an action taken to avoid discriminating is itself discrimination would make this impossible.

The City of New Haven was faced with evidence that its promotional tests had a serious adverse impact on Latinos, as well as African Americans. For the lieutenant's exam, the pass rate for Whites was 58.14%, but for African Americans, it was 31.58%, and for Latinos, it was a mere 20%. Pet. App. 426a, 429a-432a, 437a. The pass rate for Latinos fails the Equal Employment Opportunity Commission's four-fifths rule by a wide margin, supporting an inference that the test created a serious disparate impact on Latinos, in particular. The pass rates for the captains exam were similar. On the captain's exam, Whites passed at a rate of 64%, while African Americans and Latinos each passed at a rate of 37.5%, again, failing the four-fifths rule by a wide margin. *Id.* at 427a, 433a-436a, 438a.

It was not only the pass rate that suggested an

adverse impact. The relative ranks of Latinos who passed the exams were low. The highest scoring Latino was ranked 27th on the lieutenant's exam, which ensured that no Latino scored well enough to be able to be promoted under the city's rules. *Id.* at 437a. And only two Latinos scored well enough on the captain's exam to be considered for promotion, one of whom is one of the plaintiffs. *Id.* at 438a. Furthermore, over the one to two year life of the lists, only one more Latino candidate could ever have been promoted, not the four more one might expect if the tests were fair

Faced with this evidence, the defendants were understandably concerned that the promotions process might create an unlawful disparate impact, that the process was an obstacle to equality of opportunity in the fire department. The defendants' decision to scrutinize the process and explore whether there might be less discriminatory alternatives should be encouraged rather than discouraged.

Such scrutiny and exploration was necessary in the city of Bridgeport, which has also had to overcome a significant history of race discrimination. *See*, *e.g.*, *Ass'n Against Discrimination in Employment, Inc. v. Bridgeport*, 647 F.2d 256 (2d Cir. 1981); *Ass'n Against Discrimination in Employment, Inc. v. Bridgeport*, 594 F.2d 306 (2d Cir. 1979); *Ass'n Against Discrimination in Employment, Inc. v. Bridgeport*, 479 F. Supp. 101 (D. Conn. 1979). Its solution has been to change the relevant weights of promotional exam: the oral examination constitutes 65% of the score, and the written examination 30%. Pet. App. at 485a-486a. The city of Bridgeport was also sued recently for discrimination against white firefighters for the relative weights given the written and oral

examination pieces of a promotional examination; that suit proved unsuccessful. See *Bolton v. Bridgeport*, 467 F. Supp. 2d 245 (D. Conn. 2006). The kind of experimenting with assessment methods to find a valid measure of fitness for promotion while minimizing the racial impact of the process, like that done by the city of Bridgeport, should be encouraged.

We have come a long way in the more than forty years since Title VII was enacted. Race is becoming less salient with every new generation of workers. A decision by this Court equating Title VII compliance efforts with discrimination will inevitably reverse that trend. And if that trend is reversed, not only do we freeze our progress toward racial justice where we are, or perhaps move backwards, but we also make race something always to be contested.

Suggesting that white people are injured when an employer decides not to act out of concern that the action would discriminate reinforces the notion that white people have some sort of greater entitlement to jobs or promotions than do people of color. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). It creates an incentive for white people to resist employer compliance with Title VII, and it creates an incentive for white people to resist social advancement of people of color in other settings as well. Such an incentive would take racial politics back to the 1960s or before. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, ___, 127 S. Ct. 2738, 2788-97 (2007) (Kennedy, J., concurring).

II. PETITIONERS FAILED TO PROVIDE SUFFICIENT ADMISSIBLE EVIDENCE FROM WHICH A REASONABLE JURY COULD CONCLUDE THAT THE CITY'S REASON FOR DISCARDING THE TEST RESULTS WAS A PRETEXT FOR DISCRIMINATION

Plaintiffs allege that the Defendants' actions which led the City of New Haven's Civil Service Board (CSB) to not certify the results of the promotional exams for lieutenant and captain constituted disparate treatment on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Both Title VII and the Equal Protection Clause prohibit a government employer from taking an adverse action against employees or applicants because of race.

At the summary judgment stage in employment discrimination cases, the test used to determine whether enough facts exist to warrant going to trial is that developed by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and refined in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In a failure-to-promote case, the plaintiffs must provide enough evidence to prove a prima facie case of discrimination: first that the plaintiffs are members of a class protected by Title VII or the Equal Protection Clause; that they applied and were qualified for promotion; that they suffered an adverse action, such as that they were denied promotion; and that there is

something to link that denial with their protected class. *McDonnell Douglas Corp.*, 411 U.S. at 802-03.

Once the plaintiff has proven a prima facie case of discrimination, the defendant has the burden to produce evidence that it was motivated by a non-discriminatory reason. *Id.* at 802-03. If the defendant meets that burden, the plaintiff may still prevail by providing evidence from which a reasonable jury could conclude that the employer's stated reason is a pretext for discrimination. *Id.* at 803-04. The plaintiff may do that by providing evidence that casts the employer's articulated reason into doubt or by providing stronger evidence than that required for the prima facie case to link the decision with the plaintiffs' class. *Reeves*, 530 U.S. at 143. The key is that there must be enough evidence to allow a reasonable jury to disbelieve the employer's asserted reason. *Id.* at 147-48.

The employer's reason and pretext are viewed as subjective matters. The question is not whether the employer's reason is correct as an absolute matter, but whether the employer honestly believed in the truth of the reason. *See* Barbara Lindemann & Paul Grossman, Employment Discrimination Law 86-87 (4th ed. 2007) (collecting cases). In this case, there is simply no evidence to cast the honesty of the defendants' beliefs into doubt.

In the instant case, the district court and court of appeals assumed that the plaintiffs had satisfied their burden to provide evidence of a prima facie case. The defendants' proffered reason for their actions which culminated in not certifying the results is that they were concerned that the test might discriminate under the disparate impact provisions of Title VII. If this assertion is true in the sense that they really

honestly believed that the test discriminated, this would be a nondiscriminatory reason for all of the reasons that the defendants and several *amici* have suggested.

And as the Government points out in its brief, the only question that would remain is whether this reason was the defendants' real reason or instead was actually a pretext for discrimination. In other words, did the defendants honestly believe that the test might discriminate and did they want to avoid that result, or instead did the defendants desire to deny promotions to the plaintiffs *because* they were white? Did the defendants use race or a race linked criterion as a proxy for fitness for promotion? That is a factual question. And in this case, there was unrefuted evidence to suggest that the plaintiffs were motivated by a desire to comply with Title VII and avoid using discriminatory promotion criteria. Plaintiffs had the opportunity to show that these reasons were a pretext for discrimination, but they failed to provide evidence from which a reasonable jury could conclude that the defendants are not being truthful about their motivations.

The evidence in the record details how counsel for the city, defendant Ude, first raised the issue of potential discrimination to the CSB. Pet. App. 439a-444a. The opinion letter he provided laid out the facts and the law on disparate impact, acknowledging that while the disparate pass rates and rankings showed an adverse impact, the city could rely on a professionally developed test that was job related and consistent with a business necessity and that anyone challenging the test would still have the burden to demonstrate that there were other valid means to assess qualification

for promotion that would have less of an impact. *Id.* at 440a-442a. While there is evidence that Ude and the other defendant members of the city administration believed that the test discriminated by creating a disparate impact, there is no evidence that they acted on any motivation other than that sincere belief nor that they lied to the CSB or withheld evidence about the impact of this test or alternative processes. *See id.* at 446a-459a, 466a-589a. Defendant Ude repeatedly told the members of the CSB that they had a choice and could decide to certify the test, and other people, including CSB Chairperson Segaloff, argued in favor of certifying the results. *Id.* at 442a, 480a-484a, 574a-579a, 582a-584a, 586a-588a Plaintiffs provided no evidence at all that Ude or the other city administration defendants had any motivation other than concern about potentially discriminatory effects of the test or that they misled the defendant CSB members on either the law or the underlying facts.

The process by which the decision was made was also well documented. The CSB held open hearings, heard comments from the public, from the designer of the test, and from other people with knowledge of test design and differences in performance on standardized tests by race. *Id.* at 456a, 466a-589a. All of those who spoke confirmed that this exam had an adverse impact on candidates of color, the witnesses other than the test's designer stated that were other ways equally valid to assess fitness for promotion. Dr. Hornick, who runs a company that develops job tests testified that he had read the exam, although he hadn't studied the questions in depth, and he believed that there are other methods to assess qualifications, equally valid

but with less of an adverse impact on people of color. *Id.* at 546a-563a. Vincent Lewis, a career firefighter from Michigan, told the CSB that people of color often perform more poorly in the aggregate on standardized tests, that he couldn't say why that is, and that other fire departments have used a number of different remedies to neutralize that disparity. *Id.* at 563a-569a. Finally, Dr. Helms, a professor at Boston College who specializes in race and culture as those influence performance on tests and other assessment procedures stated that people of color tend to perform more poorly than white people on almost any kind of written test, and she explained some of the reasons that might be true. *Id.* at 570a-573a. She also said that new methods of assessment might need to be created and that if the reason for a disparate impact could be pinpointed, a test could be designed to neutralize that. *Id.* at 573a-574a.

There also was evidence in the record to demonstrate that the city of Bridgeport had encountered the same kinds of disparities in using a written test, had examined its process, and had found a valid alternative measure that did not have the same impact. Bridgeport had changed the weights given each part of the test as a result of its problems with racial disparity, so that the oral portion of the test was given 65% of the weight, and the written portion, only 30% of the weight. *Id.* at 485a. There was some evidence to suggest that the type of questioning that is done in the oral portion of the examination might better assess whether an applicant has the skills to perform well than would a written test. *Id.*

The evidence shows that members of the CSB deliberated, asked questions, and listened. *Id.* at 466a-

589a. And the two members who voted not to certify the results stated their opinions in the record. CSB member Mal Webber stated that he had planned to vote to certify,

> But I've heard enough testimony here to give me great doubts about the test itself and the testing – some of the procedures. And I believe we can do better . . . Therefore, I will vote No on this motion in order to move forward a deeper research and a complete study of how we're giving these exams because of the complete and rather horrifying disparate result of this particular examination.

Id. at 586a-587a. Similarly, CSB member Zelma Tirado sated "I also feel that the process was flawed, with the test as part of that process." *Id.* at 587a.

These statements of the two CSB members demonstrate that they were concerned that the test was flawed, that it created an unlawful disparate impact. Whether the test was flawed or whether a plaintiff would be able to successfully challenge the test under Title VII as an absolute matter is not the issue. What matters is whether they actually believed that the test was flawed or discriminated. There is simply no evidence to suggest that they did not believe what they said. And while the defendants did not hold a trial-type, fully exhaustive hearing on why the test had such disparate results, asking each person who took the test, for example, about their process in preparing and experience in taking the test, the failure to hold such an exhaustive hearing is simply not evidence that the defendants are being dishonest about their beliefs or were motivated by the race of the

plaintiffs.

Plaintiffs provided some evidence to try to meet their burden to demonstrate that the defendants' reasons were a pretext for discrimination, but none of that evidence cast the defendants' reasons into doubt or suggested that the defendants' real motivation was that the plaintiffs were white. Plaintiffs did not depose the defendants to assess the honesty of their assertion of their beliefs. Nor did plaintiffs provide any statements made by the defendants that were inconsistent with the asserted reason or any other evidence that weighs on the defendants' credibility. Plaintiffs instead focused on issues unrelated to the defendants' states of mind, like how the test was designed and how hard the plaintiffs worked. *Id.* at 147a-167a, 375a-425a. This evidence does not cast any doubt on the reasons proffered by the defendants and thus does not help the plaintiffs withstand a motion for summary judgment.

Taking the plaintiffs' evidence as true, as required on summary judgment, there is simply no evidence to suggest that the defendants have lied about their concern that the test might discriminate or might be flawed. Their blanket assertions of tainted process or improper influence simply are not evidence. The City's investigation was not so unreasonable to suggest that defendants did not actually believe that the test might be discriminatory. Rather, the CSB undertook a deliberate process, including multiple hearings where it heard from numerous witnesses, including some of the petitioners here and petitioners' counsel. Furthermore, there is simply no evidence to suggest that the defendants used race as a proxy for fitness to be promoted. Without that evidence, without

concrete examples to support their allegations of bias, summary judgment for plaintiffs was properly granted.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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